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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 212

WEST OHIO GAS COMPANY,

Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

STATEMENT AS TO JURISDICTION ON APPEAL.

MAY IT PLEASE THE COURT:

Pursuant to Rule 12 of the Supreme Court of the United States, West Ohio Gas Company, appellant in this appeal from a decision of the Supreme Court of Ohio made in the above cause, respectfully shows the following in support of the jurisdiction of the Supreme Court of the United States to review the aforesaid cause on appeal:

A.

Statutory Provisions Sustaining Jurisdiction.

Chapter 14, 45 Stat. 54 of the Acts of Congress of January 31, 1928 (U. S. C. Sup. VI, Title 28 "Judicial Code and Judiciary", Sec. 861a), provides:

> "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

Chapter 440, 45 Stat. 466 of the Acts of Congress of April 26, 1928 (U. S. C. Sup. VI, Title 28 "Judicial Code and Judiciary", Sec. 861b), provides:

> "The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

Chapter 229, 43 Stat. 936 of the Acts of Congress, amends subsection (a) of Section 237 of the original Judicial Code, so that the same provides as follows (U. S. C., Title 28, "Judicial Code and Judiciary", Sec. 344 (a)):

> "(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

B.

Date of Judgment and of Petition for Appeal.

NOTE:

Paragraph 2 of Rule 10 of the Supreme Court of the United States provides that the clerk of the court from which an appeal to the Supreme Court of the United

States may be allowed shall make and submit to that Court a certified copy of the material parts of the record.

Rule 12 of the Supreme Court of the United States, as amended, now requires the presentation to the judge to whom the application for allowance of the appeal is made, of a statement in typewritten form of the grounds of jurisdiction.

It is assumed that where the application for appeal is made to the chief justice of the court possessing the record, the transcript of the record need not be made up until or unless the appeal is allowed The appropriate pages of the record are therefore left blank, and appellant undertakes to supply the appropriate pages for insertion therein prior to the printing of the record for the use of the Supreme Court.

The decision of the Supreme Court of Ohio was announced by written opinion dated May 16, 1934 (R. 18-43). A petition for rehearing was filed in said court on May 29, 1934, within the time fixed by the rules of said court (R. 44-67; 69). (Rule No. XX of said court.) Said petition for rehearing was denied by said court on June 6, 1934 (R. 69, 70).

The petition for appeal was filed in the office of the clerk of the Supreme Court of Ohio and allowed by the chief justice of said court on June 15, 1934 (R. 69; 72-80).

C.

Nature of Case and Ruling Below.

The case in the Supreme Court of Ohio was a proceeding in error under Sections 544, 545 and 549 of the General Code of Ohio, from a final order made by appellee on March 11, 1933, fixing a rate to be charged by appellant for gas utility service rendered within the city of Lima, Ohio, for a

period of five years from and after on or about April 19, 1928.

The Supreme Court of Ohio is the highest and the only court in Ohio in which a decision in the case may be had.

Said Sections 544, 545 and 549 of said General Code of Ohio provide as follows:

Section 544 (Volume 103 Ohio Laws, page 815, section 33):

> "A final order made by the commission shall be reversed, vacated or modified by the supreme court, on a petition in error, if upon consideration of the record such court is of the opinion that such order was unlawful or unreasonable."

Section 545 (Volume 103 Ohio Laws, page 815, section 34):

> "The proceeding to obtain such reversal, vacation or modification shall be by petition in error, filed in the supreme court, by any party to the proceeding before the commission, against the public utilities commission of Ohio, setting forth the errors complained of. Thereupon unless the same is duly waived a summons shall issue and be served, as in other cases, upon the chairman of the commission, or, in the event of his absence, upon any member of the commission, or by leaving a copy at the office of the commission at the city of Columbus. The court may permit any interested party to intervene by cross-petition in error."

Section 549 (Volume 103 Ohio Laws, page 816, section 38):

> "No court other than the supreme court shall have power to review, suspend or delay any order made by the commission, or enjoin, restrain or interfere with the commission or any member thereof in the performance of official duties. Nor shall the writ of mandamus be issued against the commission or any member by any court other than the supreme court."

The said final order of appellee was made in a proceeding in which appellant had complained of, and appealed from, an ordinance of the city of Lima, Ohio, approved March 19, 1928, fixing the rate to be charged by appellant for gas utility service rendered by it within said city of Lima, Ohio, for a period of five years from and after on or about April 19, 1928 (R. 110-112). Said final order of appellee found said ordinance rate to be unjust and unreasonable, but fixed a rate to be charged for said gas utility service during said five-year period that was substantially lower than the rate that was being charged by appellant and had been charged by it during said five-year period (R. 129-130; 131). Said final order was accompanied by an opinion of appellee setting forth its reasons in support of said order (R. 131-138).

Subsequent to the entry by appellee of said final order fixing said rates, appellant on March 18, 1933, filed with appellee an application for rehearing on the grounds: that the rates fixed by the said final order were unlawful and unreasonable and confiscatory of the property of appellant devoted to the public service, and therefore said final order impinged upon rights guaranteed appellant by, and was invalid under, the Fourteenth Amendment of the Constitution of the United States; and that because said final order was not founded upon the evidence, because it disregarded the evidence and because it was based upon matters not properly in evidence, appellant had been denied the due process of law and equal protection of the laws to which appellant was entitled under the Fourteenth Amendment of the Constitution of the United States. Said application for rehearing set out specifically the basis of each objection by appellant to said final order. In and by said application for rehearing appellant asked that it be permitted to show in evidence the facts as to its decreased revenues and net earnings from gas utility service in Lima

during 1932 and the then expired portion of 1933, which facts had not yet been determined when the hearings before appellee were closed, and that appellant be permitted to show the exact effect of the application of the rates fixed by appellee upon appellant's revenues and net earnings from said gas utility service for so much of said ordinance period as had expired (R. 139-150).

Said application for rehearing was required by the laws of the State of Ohio as a condition precedent to a review by the Supreme Court of Ohio of the said final order of appellee. Said application for rehearing was denied on March 22, 1933 (R. 151).

Upon such denial appellant filed in the Supreme Court of Ohio on April 1, 1933, a petition in error claiming that, for reasons which were therein specifically set out and which were the same as those set out in said application for rehearing filed with appellee as aforestated, said final order of appellee was unlawful and unreasonable and confiscatory of the property of appellant devoted to the public service, and impinged upon rights guaranteed appellant by, and was invalid under, the Fourteenth Amendment of the Constitution of the United States, and that because said final order appealed from was not founded upon the evidence, because it was made in disregard of the evidence, and because it was based upon matters not properly in evidence, appellant had been denied the due process of law and the equal protection of the laws to which it was entitled under the said Fourteenth Amendment to the Constitution of the United States. In its said petition in error, appellant also claimed and asserted that because appellee had denied appellant the rehearing duly prayed for, had denied appellant an opportunity to show the facts as to its revenues and net earnings from said gas utility service in Lima during the period subsequent to the closing of the taking of testimony in the proceedings before appellee, and had

denied appellant an opportunity to show the exact effect of the rates fixed by appellee upon appellant's revenues and net earnings from said gas utility service for so much of said ordinance period as had expired, appellant had been denied the due process of law and the equal protection of the laws to which it was entitled under the Fourteenth Amendment to the Constitution of the United States (R. 2-17).

The proceedings in error filed by appellant were docketed in said Supreme Court of Ohio as cause No. 24104.

The question of the invalidity of said order on said grounds above referred to was presented and submitted to the Supreme Court of Ohio in both written and oral argument.

The judgment of the Supreme Court of Ohio rendered on May 16, 1934, as aforestated, was in favor of the validity of said final order of appellee (R. 70).

D.

Cases Believed to Sustain Jurisdiction.

The following decisions are believed to sustain jurisdiction of this appeal:

Bluefield Waterworks & Improvement Company v. *Public Service Commission of the State of West Virginia et al.*, 262 U. S. 679;

Southwestern Bell Telephone Company v. *Public Service Commission of Missouri et al.*, 262 U. S. 276;

Ohio Utilities Company v. *Public Utilities Commission of Ohio*, 267 U. S. 359;

United Railways and Electric Company of Baltimore v. *West et al.*, 280 U. S. 234;

Dayton Power & Light Company v. *Public Utilities Commission of Ohio*, — U. S. —, 54 Sup. Ct. Rep. 647;

Columbus Gas and Fuel Company v. *Public Utilities Commission of Ohio et al.*, — U. S. —, 54 Sup. Ct. Rep. 763;

Williams v. *Bruffy*, 96 U. S. 176, 182-3;

Ex parte Young, 209 U. S. 123, 144;

Atlantic Coast Line Railroad Company v. *City of Goldsboro, North Carolina*, 232 U. S. 548, 555;

St. Louis, Iron Mountain & Southern Railway Company v. *Starbird, Administrator of Miller*, 243 U. S. 592.

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of section 237 of the Judicial Code, as amended by the Act of February 13, 1925 (now section 344(a) of Title 28 of the U. S. C.), and as further amended or modified by the Acts of January 31, 1928, and April 26, 1928 (now sections 861a and 861b of Title 28 of U. S. C., Sup. VI).

Respectfully submitted,

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Received a copy of the foregoing Statement as to Jurisdiction on Appeal this 15th day of June, 1934.

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